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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

ROBERT HERRERA et al., Plaintiffs and Appellants, v. AHMSI DEFAULT SERVICES, INC., Defendant and Respondent.	C065924 (Super. Ct. No. SC20090193)

Plaintiffs Robert Herrera and Gail Herrera (the Herreras) purchased real property in South Lake Tahoe, California, at a foreclosure sale related to a second deed of trust recorded on April 4, 2007. Thereafter, U.S. Bank National Association, as Trustee for the Certificate Holders of Asset Backed Securities Corporation Home Equity Loan Trust Series OOMC 2006-HE5 (U.S. Bank), purchased the same property at a *second* foreclosure sale related to a first deed of trust recorded on April 17, 2006. Believing this latter foreclosure to be unlawful, the Herreras filed a lawsuit against AHMSI Default Services, Inc. (AHMSI), U.S. Bank, and other defendants connected to the foreclosure.

In the operative complaint, the Herreras alleged four causes of action: (1) to set aside the foreclosure sale at which U.S. Bank purchased the property, (2) to cancel the trustee's deed conveying the property to U.S. Bank, (3) to quiet title to the property, and (4) to recover for unjust enrichment. The first three causes of action are alleged against AHMSI.

AHMSI demurred to the operative complaint and attacked all four causes of action. The trial court sustained the demurrer with prejudice and dismissed the entire case. The Herreras appealed.

On appeal, the Herreras principally argue that the trial court erred in taking judicial notice of recorded documents that AHMSI submitted in connection with the demurrer. Whatever the merit of this argument, we need not address it. As we explain, a final judgment reached in a related unlawful detainer action filed by U.S. Bank has conclusively resolved issues against the Herreras and eviscerated their first three causes of action. After issue preclusion is applied, what remains of the first three causes of action fails to advance any viable claim. Accordingly, we affirm the dismissal of the first three causes of action. However, we reverse the trial court's dismissal of the fourth cause of action. AHMSI had no standing to demur to the fourth cause of action because it was alleged only against U.S. Bank.

BACKGROUND

I. The Operative Complaint

The operative complaint names as defendants T.D. Service Company, aka Beneficiary Foreclosure Services, LLC (T.D. Service Company), AHMSI, U.S. Bank, and Does 1 through 50, inclusive.

According to the operative complaint, the Herreras acquired a "run-down, distressed property" at 725 Los Angeles Street in South Lake Tahoe pursuant to a "Trustee's Deed Upon Sale filed approximately April 29, 2009." The Herreras believed the price they paid for the property reflected its then-existing value.[1]

Subsequently, "[o]n or about July[] 2009," the Herreras received a Notice of Trustee's Sale concerning the property they had purchased. The notice was served by T.D. Service Company and the alleged trustee was AHMSI.

The operative complaint alleges that AHMSI "arranged" and conducted an "improper and illegal" trustee's sale of the Herreras' property on August 27, 2009. At the trustee's sale, the property was sold to U.S. Bank.

As an explanation as to why the property the Herreras acquired was subsequently foreclosed upon, the operative complaint alleges on information and belief that "the previous owners" of the property "may have taken out a mortgage on the property with an unnamed entity and secured this mortgage with a deed of trust." The Herreras alleged they "had no knowledge

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[1] As stated in their trial court briefing, the Herreras "make their living in housing construction."

that the previous [home]owner[s] may have taken out [this] additional mortgage . . . until after the[y] purchased the property." If this additional mortgage loan was taken out by the previous owners, "all of the assignments of interests" in this mortgage loan were not recorded, and, moreover, an "unnamed entity" "bundled" this mortgage loan with other mortgage loans to create a "mortgage[-]backed security" investment that was sold to third parties, making it "impossible to determine" who owns any particular mortgage loan in the bundle.

A. First Cause of Action -- Set Aside Trustee's Sale

The first cause of action, to "Set Aside [The] Trustee's Sale" that occurred in August 2009, alleges that "no defendant caused to be published [or] posted the proper notices of the intent to sell the subject property." Moreover, the purchaser, U.S. Bank, has "no provable interest" in the property. "[W]hatever promissory note that may have existed as supporting the Trustee's sale no longer exists, thus the Trustee's sale is void ab initio." Finally, "[o]n information and belief[,] the sale was improperly held and the trustee's deed was wrongfully executed, delivered and recorded in that no entity had sufficient interest in the property to hold a trustee's sale and no entity had sufficient interest [or] paid consideration for the property. [The Herreras] have been wrongfully deprived of the legal title by forfeture [*sic*]."

B. Second Cause of Action -- Cancel Trustee's Deed

The second cause of action, to "Cancel [The] Trustee's Deed" transferring the property to U.S. Bank, incorporates the

previous allegations and further avers that AHMSI, or "an entity claiming through AHMSI, Defendant, U.S. Bank . . . , claims a[n] estate or interest in the subject property adverse to that of [the Herreras]. Defendant's [*sic*] claims are without any right; Defendants have no estate, right, title, or interest in the real property."

C. Third Cause of Action -- Quiet Title

The third cause of action, to "Quiet Title" to the property, incorporates the previous allegations and further avers "[o]n information and belief . . . that no named defendant [or] DOE defendant owns or possesses an original, verifiable, promissory note or deed of trust pertaining to the subject property; that no defendant has standing to foreclose upon [the Herreras'] property; that all rights, title and interest asserted by any defendants, if any existed, were sublimated into a non-functional 'security' interest . . . . Thus no entity has legal standing to oppose this complaint."

D. Fourth Cause of Action -- Unjust Enrichment

The fourth cause of action, for unjust enrichment against U.S. Bank, incorporates the previous allegations and further avers that the Herreras "have paid for and done all of the deferred maintenance upon the subject property prior to and during this litigation. Without their efforts the property would be uninhabitable and be the subject of fines and other legal action by the county as a public nuisance. [The Herreras] have paid all back taxes and had the property insured against loss. All at [the Herreras'] expense and detriment. [¶]

. . . Should [the Herreras] not prevail in the [*sic*] and should [U.S. Bank] obtain the ownership and possession of the subject property, [U.S. Bank] will obtain the benefit of all of [the Herreras'] expenses [and] efforts in maintaining the property, paying taxes and insurance upon the property. Such acceptance and retention of the above[-]referenced benefit constitutes unjust enrichment."

II. AHMSI'S Demurrer

AHMSI (and only AHMSI) demurred to the operative complaint. In connection therewith, AHMSI requested judicial notice of several recorded documents.[2]

The documents showed two deeds of trust attached to the property. The first deed of trust was recorded on April 17, 2006. The second deed of trust was recorded on April 4, 2007. As contended by AHMSI, the records demonstrated that the

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[2] These records include: (1) a deed of trust executed by Donald Anderson and Debra Grimes, recorded April 17, 2006 (first deed of trust); (2) a Notice of Default and Election to Sell Under Deed of Trust related to the first deed of trust, recorded August 1, 2008; (3) a Notice of Trustee's Sale related to the first deed of trust, recorded March 25, 2009; (4) A Trustee's Deed Upon Sale related to the first deed of trust, recorded September 4, 2009 reflecting a conveyance from trustee AHMSI to U.S. Bank; (5) a deed of trust executed by Donald Anderson and Debra Grimes, recorded April 4, 2007 (second deed of trust); (6) a Notice of Default and Election To Sell Under Deed of Trust related to the second deed of trust, recorded March 19, 2008; (7) a Notice of Trustee's Sale related to the second deed of trust, recorded July 22, 2008; and (8) a Trustee's Deed Upon Sale related to the second deed of trust, recorded April 29, 2009, reflecting a conveyance from Foreclosurelink, Inc., as trustee of all of "its right, title and interest in" the property to "Robert Herrera & Gale Herrera."

Herreras purchased the property at the foreclosure sale on the *second deed of trust*, taking the property subject to the first deed of trust. AHMSI argued that "simple resort to the public records . . . would have revealed" the existence of the first deed of trust, which was senior. It was this first deed of trust that was foreclosed upon in August 2009 pursuant to which U.S. Bank acquired the property.

AHMSI demurred to the first two causes of action (to set aside the trustee's sale and cancel the trustee's deed) on several grounds. AHMSI argued that the operative complaint was conclusory and failed to allege any facts showing that the August 2009 foreclosure sale was unlawful. In addition, AHMSI argued that because the Herreras failed to allege that they cured the default in the senior indebtedness, their interest in the property had been "extinguished" at the August 2009 foreclosure sale. Lastly, even if the August 2009 foreclosure sale was somehow improper, the Herreras failed to allege tender of the senior obligation. Consequently, the first two causes of action were defective.

As to the third cause of action to quiet title, AHMSI argued that the operative complaint failed to comply with Code of Civil Procedure section 760.020, which requires a verified complaint. As to the fourth cause of action, AHMSI argued that "Plaintiffs have not alleged how it is Defendant has been unjustly enriched in this matter." Finally, AHMSI sought dismissal of the operative complaint on the ground that the

Herreras failed to join an indispensable party to the action; namely, U.S. Bank, the current owner of the property.

The Herreras filed a written opposition to the demurrer and the court held a hearing on the demurrer on July 9, 2010, at which no party appeared.

The court issued a written tentative decision in advance of the hearing date. In its tentative decision, the court took judicial notice of the documents AHMSI submitted over the Herreras' nonspecific hearsay objection, credited the bulk of AHMSI's arguments, and sustained the demurrer as to all causes of action without leave to amend. Absent objection, the tentative decision became the final order of the court. Judgment was then entered dismissing the case in its entirety[3] and this appeal followed.

DISCUSSION

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as

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[3] In its judgment dismissing the case, the court incorrectly cited Code of Civil Procedure section 581, subdivision (f)(2), which authorizes dismissals when a demurrer to a complaint is sustained with leave to amend and the plaintiff fails to amend. Undoubtedly, the court meant to cite Code of Civil Procedure section 581, subdivision (f)(1), which authorizes dismissals when, as here, a defendant's demurrer is sustained without leave to amend. No party claims prejudice as a result of this error.

admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) The burden of proving a reasonable possibility of amendment is on the plaintiff (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126), and the burden can be met for the first time on appeal (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1041-1042).

On appeal, the Herreras devote substantial briefing to mounting a heated and unnecessarily distracting attack on the "foreclosure industry." Their chief legal contention is that the trial court erred when it took judicial notice of the recorded documents that AHMSI submitted and then used the contents of those records -- the veracity of which they dispute -- in ruling against them. Disputing "virtually everything" about the documents, the Herreras contend that AHMSI failed to properly authenticate the documents and that the contents of the documents are hearsay.

AHMSI contends that the trial court properly took judicial notice of the submitted documents and properly sustained the demurrer on all stated grounds.

In addition, for the first time, AHMSI argues that by virtue of a final judgment reached in a related unlawful detainer action brought by U.S. Bank under Code of Civil Procedure section 1161a[4] (section 1161a), the Herreras are now collaterally estopped from relitigating, in this case, the issue of title to the property. The documents relating to the unlawful detainer action and the associated judgment are contained in our record on appeal. In the paragraphs that follow, we address the issue preclusion argument.

I. Issue Preclusion

"Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) At the outset, we recognize that AHMSI did not raise issue preclusion in its demurrer.[5] Normally, issues not raised in the trial court are subject to forfeiture on appeal. Nevertheless, an appellate court retains discretion to consider issues not presented in the trial court. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) For several

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[4] Undesignated section references are to the Code of Civil Procedure.

[5] The Herreras filed their action against AHMSI on August 31, 2009. The unlawful detainer action was filed on September 28, 2009. AHMSI filed its demurrer to the operative complaint on May 14, 2010. The judgment was entered in the unlawful detainer action on May 20, 2010. The hearing on the demurrer was held on July 9, 2010, more than a month after final judgment was entered in the unlawful detainer action.

reasons, we exercise our discretion to consider the application of issue preclusion.

First, the Herreras do not contend that AHMSI forfeited the issue preclusion argument. Like other contentions, forfeiture itself may be deemed forfeited for failure to assert it. (See *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 295, fn. 2 [considering the merits of arguments raised for the first time on appeal because forfeiture was not argued]; see also *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived"].)

Second, appellate courts may consider a new contention on appeal when it "raises a purely legal issue." (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 195; see also *Frink v. Prod* (1982) 31 Cal.3d 166, 170; *Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131.) Here, the court documents from the unlawful detainer action are in the record, and whether issue preclusion applies is a purely legal issue. We simply compare the properly pleaded facts alleged in the operative complaint (which we must accept as true) to the issues adjudicated in the unlawful detainer action (which we can glean from the nature of that proceeding, the complaint, the Herreras' notice of related action and "answer," the summary judgment filings, and the court's decision). From this comparison, we reach a legal conclusion as to whether issue preclusion applies. (See *Noble v. Draper* (2008) 160 Cal.App.4th 1, 10 [application

of collateral estoppel "presents a question of law"]; *Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 618 [same].)

Third, applying the doctrine of issue preclusion fosters judicial economy, protects litigants from vexatious and duplicative litigation (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829), and honors the "strong public policy favoring the finality of judgments" (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 469).

For these reasons, we consider the merits of AHMSI's issue preclusion argument. To put the matters implicated by the unlawful detainer action into focus, a brief discussion of relevant legal principles is warranted.

A. Unlawful Detainer after Foreclosure

After a trustee's sale, the purchaser may bring an unlawful detainer action under section 1161a, subdivision (b)(3) (section 1161a(b)(3)) to end any continuing occupancy of the property believed to be unlawful. Section 1161a(b)(3) provides, in relevant part: "(b) . . . a person who holds over and continues in possession of . . . real property after a three-day written notice to quit the property has been served upon the person . . . , may be removed therefrom . . . . [¶] . . . [¶] (3) Where the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust . . . and the title under the sale has been duly perfected."

A plaintiff pursuing a postforeclosure action under section 1161a(b)(3) must "prove a sale in compliance with the

statute [Civ. Code, § 2924] and deed of trust, followed by purchase at such sale." (*Cheney v. Trauzettel* (1937) 9 Cal.2d 158, 160 (*Cheney*); see also *Old National Financial Services, Inc. v. Seibert* (1987) 194 Cal.App.3d 460, 465 [reiterating the same].)

B. U.S. Bank's Unlawful Detainer Action

On September 28, 2009, U.S. Bank filed a postforeclosure unlawful detainer action under section 1161a(b)(3). The action was filed in the same superior court in which the Herreras filed their lawsuit. However, the unlawful detainer action was filed as a "limited" civil case and routed to a different judicial department.

Initially, U.S. Bank filed its unlawful detainer action against Donald Anderson, Debra Grimes, and Does 1 through 100, inclusive. On October 27, 2009, however, the Herreras intervened in the unlawful detainer action by filing a combined "NOTICE OF RELATED AND IDENTICAL CASES; PREJUDGMENT RIGHT TO POSSESSION AND *ANSWER*." (Italics added.) In that filing, the Herreras asserted that Donald Anderson and Debra Grimes were the prior owners of the property, that the Herreras were now the current owners of the property, that U.S. Bank's title was defective and that the Herreras' title was superior. The portion of the filing entitled "ANSWER -- UNLAWFUL DETAINER" reads, "Robert Herrera generally denies each statement of the complaint. [¶] Affirmative Defenses: Plaintiff has no right[], title[] [or] interest[] in the subject property and any title Plaintiff may have is inferior to the title of Robert and

Gail Herrera." The Herreras also called the court's attention to their pending lawsuit, but did not request that the court do anything relative to that case.

In April 2010, U.S. Bank filed a motion for summary judgment on its claim, relying on section 1161a(b)(3). The Herreras filed an opposition, in which they criticized the foreclosure industry, as well as the attorneys for U.S. Bank, calling the latter "L.A. Collection counsel." In their opposition, the Herreras argued that "L.A. Collection Counsel cannot have summary judgment in a case where title is in issue in another court of unlimited jurisdiction." The Herreras also asserted that the summary judgment motion was "pointless because this Court has no jurisdiction over title to real property valued in excess of $25,000." The Herreras made no evidentiary objections to the proof proffered by U.S. Bank. Nor did the Herreras offer any separate facts whatsoever. Consequently, the court was provided with no facts supporting the Herreras' contention that U.S. Bank's title was defective, or the Herreras' affirmative defense in which they claimed their title was superior to any title U.S. Bank might have. Instead, the Herreras merely requested that the court deny the motion and transfer the case to the judicial department in which their lawsuit against AHMSI was pending so they could move to consolidate. The record does not reflect any prior request to transfer the unlawful detainer case or prior attempts to consolidate the two cases.

Instead of transferring the unlawful detainer action, the court in which that matter was pending heard the motion for summary judgment on May 20, 2010 and granted the motion that same day. The written order granting the motion states in pertinent part: "Plaintiff [U.S. Bank], in support of its motion for summary judgment on this cause of action for unlawful detainer, proffered evidence that established each necessary element of this unlawful detainer as follows: [¶] a. On 8/27/2009 Plaintiff purchased the subject real property located at 725 LOS ANGELES AVE, SOUTH LAKE TAHOE, CA 96150 ("Premises") at a duly noticed and validly conducted Trustee's Sale. Plaintiff supplied certified copies of a Trustee's Deed Upon Sale with recitals of compliance with [Civil Code section] 2924, the Deed of Trust and the Substitution of Trustee, which established the foreclosure sale in compliance with [Civil Code section] 2924 and perfection of title; [s]ee Certified Copy of Trustee's Sale attached as Exhibit "A" to Declaration of Amy E. Starrett; Certified Copy of Deed of Trust attached as Exhibit "B" to Declaration of Amy E. Starrett; Certified copy of Substitution of Trustee attached as Exhibit "E" to Declaration of Amy E. Starrett; [¶] b. Plaintiff properly served a three[-]day Notice to Vacate Property on the defendant pursuant to [] [section] 1161a(b). See Notice and Proof of Service attached as Exhibit "F" to the Declaration of Amy E. Starrett; and [¶] c. Defendant has continued in possession after the expiration of said Notice to Vacate." The court further stated that U.S. Bank met its summary judgment burden and that the Herreras, "in

opposition to [the] motion, proffered no evidence and thus failed to raise any triable issue of fact."

On May 20, 2010, the court entered judgment on its order granting summary judgment. Thereafter the Herreras filed in the superior court an ex parte petition for an order staying the court's judgment in the unlawful detainer action. The petition was denied on July 13, 2010.

With this background in mind, we now analyze the preclusive effect the unlawful detainer judgment has on the Herreras' pending lawsuit.

C. Analysis

The five required elements of issue preclusion are: (1) the issue sought to be precluded in the present proceeding is identical to that decided in the prior proceeding, (2) the issue must have been actually litigated in the prior proceeding, (3) the issue must have been necessarily decided in the prior proceeding, (4) the decision in the prior proceeding must be final and on the merits, and (5) the party against whom issue preclusion is sought must be the same as, or in privity with, the party to the prior proceeding. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) The burden of establishing issue preclusion falls on the party asserting it. (*Lucido*, *supra*, 51 Cal.3d at p. 341.)

1. Parties to the unlawful detainer action

We begin with the last element -- that the party against whom issue preclusion is sought must be the same as, or in privity with, the party to the prior proceeding. Prior to oral

argument, the Herreras did not dispute that they were parties to the unlawful detainer action filed by U.S. Bank against Anderson and Grimes. At oral argument, the Herreras argued for the first time that they were not parties. We may disregard points raised for the first time at oral argument. (*Bonshire v. Thompson* (1997) 52 Cal.App.4th 803, 808, fn. 1.)

Moreover, the Herreras' new argument lacks merit. A person not named as defendant in a complaint may become a party by voluntarily appearing and undertaking defense of the action. (*Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1297 [strangers to an action, by appearing generally in the action, may forfeit the right to object that they were not named in the complaint because the appearance operates as a consent to jurisdiction]; *Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1145-1146, 1150 [even though two entities had not been properly named as defendants or properly served, by making a general appearance they subjected themselves to the court's personal jurisdiction and became parties to the action]; *Wilson v. Frakes* (1960) 178 Cal.App.2d 580, 582 ["'A party may appear though he is not named in the complaint'"].) Filing an answer on the merits constitutes a general appearance. (*Fireman's Fund, supra,* 114 Cal.App.4th at p. 1145.) A prior judgment is binding upon real parties in interest for collateral estoppel purposes. (*Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 357.) "A real party in interest must have an actual, substantial interest in

the subject matter of the action." (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 208.)

Here, the Herreras voluntarily injected themselves into the unlawful detainer action by filing an answer claiming ownership of the subject property and undertaking a defense by filing an opposition asking the court to deny the Bank's summary judgment motion. The Herreras' "NOTICE OF RELATED AND IDENTICAL CASES; PREJUDGMENT RIGHT TO POSSESSION AND ANSWER" was filed by counsel as "Attorney for Robert and Gale [*sic*] Herrera"; named Robert but not Gail in the caption as "real party in interest"; repeatedly referred to both Robert and Gail as owners of the subject property; and was signed by counsel as attorney for both Robert and Gail. The answer itself stated that Robert generally denied the complaint's allegations and asserted as an affirmative defense that any title U.S. Bank may have was inferior to the title of Robert and Gail. Similarly, the Herreras' opposition to the Bank's summary judgment motion was filed by counsel as attorney for both Robert and "Gale" and repeatedly referred to the Herreras as a couple. Though the text of the order granting summary judgment referred to "Defendant" in the singular, the caption of the order named "DONALD ANDERSON, DEBRA GRIMES, ROBERT HERRERA; et al." as "Defendant." The judgment bore the same caption, though the text referred to defendants as Anderson, Grimes, and Robert Herrera. The Herreras' ex parte motion to set aside the judgment was filed by counsel as attorney for both Robert and "Gale" [*sic*], though the caption named only Robert, not Gail.

However, their ex parte petition for writ of mandate named in the caption both Robert and Gail as petitioners, as well as being filed by counsel as attorney for both Robert and Gail. We conclude the Herreras made themselves parties to the unlawful detainer action.

2. Applying issue preclusion

There is no question that the grant of summary judgment in the unlawful detainer action is now a final judgment on the merits. No party suggests otherwise. The question is whether some issue was actually and necessarily litigated in the unlawful detainer action that overlaps with the Herrerras' pending lawsuit.

AHMSI argues that the "issue of *title has already been put to rest*" (italics in original) as a result of the unlawful detainer judgment, thus barring the Herreras' effort, in their first three causes of action, to attack U.S. Bank's title. In support, AHMSI cites *Vella v. Hudgins* (1977) 20 Cal.3d 251 (*Vella*) and *Malkoskie v. Option One Mortgage* (2010) 188 Cal.App.4th 968 (*Malkoskie*). *Malkoskie* is a present-day application of *Vella*.

As our high court in *Vella* explained: "[A] judgment in unlawful detainer usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title [citations], or to adjudicate other legal and equitable claims between the parties [citations].

"A qualified exception to the rule that title cannot be tried in unlawful detainer is contained in Code of Civil Procedure section 1161a, which extends the summary eviction remedy beyond the conventional landlord-tenant relationship to include certain purchasers of property . . . . Section 1161a provides for a narrow and sharply focused examination of title. To establish that he is a proper plaintiff, one who has purchased property at a trustee's sale and seeks to evict the occupant in possession must show that he acquired the property at a regularly conducted sale and thereafter 'duly perfected' his title. (§ 1161a, subd. 3.) Thus, we have declared that 'to this limited extent, as provided by the statute, . . . title may be litigated in such a proceeding.' (*Cheney v. Trauzettel, supra*, 9 Cal.2d at p. 159.)

"Applying the traditional rule that a judgment rendered by a court of competent jurisdiction is conclusive as to any issues necessarily determined in that action, the courts have held that subsequent fraud or quiet title suits founded upon allegations of irregularity in a trustee's sale are barred by the prior unlawful detainer judgment. (*Freeze v. Salot* (1954) 122 Cal.App.2d 561; *Bliss v. Security-First Nat. Bank* (1947) 81 Cal.App.2d 50; *Seidell v. Anglo-California Trust Co.* (1942) 55 Cal.App.2d 913.) Where, however, the claim sought to be asserted in the second action encompasses activities not directly connected with the conduct of the sale, applicability of the res judicata doctrine, either as a complete bar to

further proceedings or as a source of collateral estoppel, is much less clear. [¶] . . . [¶]

"We agree that 'full and fair' litigation of an affirmative defense--even one not ordinarily cognizable in unlawful detainer, if it is raised without objection, and if a fair opportunity to litigate is provided--will result in a judgment conclusive upon issues material to that defense. In a summary proceeding such circumstances are uncommon. . . . The more usual case is accurately characterized by our statement in *Cheney*: 'Matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff's title, are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment.' [Citation.]" (*Vella*, *supra*, 20 Cal.3d at pp. 255-257.)

Malkoskie is similar, albeit not identical, to the Herreras' case. In *Malkoskie*, the plaintiffs' home was foreclosed upon and the plaintiffs later sued the buyer and the trustee. (*Malkoskie*, *supra*, 188 Cal.App.4th at p. 972.) Prior to the plaintiffs' lawsuit, the buyer filed an unlawful detainer action against the plaintiffs. (*Ibid.*) The plaintiffs filed an answer denying the material allegations and asserting two affirmative defenses, both of which went to the validity of the foreclosure sale, one alleging improper notice and the other alleging unspecified "'irregularities in the sale.'" (*Ibid.*) At trial in the unlawful detainer action, the parties agreed to a stipulated judgment in favor of the buyer and the plaintiffs

were then evicted. Thereafter, the plaintiffs filed their action against the buyer and the trustee, asserting a number of claims, all of which related to the validity of the foreclosure sale. The trial court sustained the buyer's demurrer without leave to amend. (*Malkoskie*, *supra*, 188 Cal.App.4th at pp. 971-972.)

Applying *Vella*, the court in *Malkoskie* concluded that the demurrer was properly sustained because the stipulated judgment barred the subsequent civil action attacking the validity of the foreclosure sale. (*Malkoskie*, *supra*, 188 Cal.App.4th at p. 973.) The court reasoned that *Vella* applied because the plaintiffs' claims were based on the alleged invalidity of the foreclosure sale. (*Malkoskie*, *supra*, at p. 974.) The purchaser expressly alleged in its unlawful detainer complaint the specific facts it contended established it had perfected legal title to the property, including that the foreclosure sale was conducted in accordance with Civil Code section 2924. The plaintiffs answered by attacking the validity of the foreclosure sale. Consequently, "[t]he conduct of the sale and the validity of the resulting transfer of title to [the purchaser] were therefore directly in issue in the unlawful detainer case." (*Ibid.*) "[B]ecause the sole basis upon which [the purchaser] asserted its right to possession of the property was its 'duly perfected' legal title obtained in the nonjudicial foreclosure sale, the validity of [the purchaser's] title *had* to be resolved in the unlawful detainer action. 'Under section 1161a, Code of Civil Procedure, a purchaser who has acquired the title at such

trustee's sale must prove that the property was sold in accordance with section 2924 of the Civil Code under a power of sale and that title under the sale has been duly perfected. Under such unlawful detainer statutes title to the extent required by section 1161a not only may but *must* be tried. . . . [Citations.]'" (*Ibid*.)

Likewise, here, title had to be tried in U.S. Bank's section 1161a unlawful detainer action against the Hererras. Moreover, the Herreras answered the unlawful detainer complaint by making a general denial, by specifically asserting that U.S. Bank's title was "defective" and by asserting an affirmative defense, contending that "[U.S. Bank] has no right[], title[] [or] interest[] in the subject property and any title [U.S. Bank] may have is inferior to the title of Robert and Gail Herrera."

The Herreras' first cause of action against AHMSI seeks to set aside the trustee's sale because the "proper notices" were allegedly not "published" or "posted." This is precisely the type of irregularity in a trustee's sale to which *Vella* speaks and which is later addressed in *Malkoskie*. Like *Malkoskie*, the Herreras' lawsuit is based on other "irregularities," but those irregularities are set forth with more specificity than was the case in *Malkoskie*. Thus, more discussion is required.

Although difficult to follow at times, the allegations of the operative complaint advance several attacks on U.S. Bank's title: (1) as mentioned, the "proper notices" were not "published" or "posted" prior to the foreclosure sale, (2) U.S.

Bank has no "provable interest" in the property and did not pay "consideration for the property," (3) the foreclosing trustee had no authority or "standing to foreclose" upon the property, and (4) the underlying promissory note "no longer exists," and no party possesses an "original" promissory note or deed of trust.

As discussed below, the first three issues were actually and necessarily litigated in the unlawful detainer action. These issues are entitled to preclusive effect and strike a fatal blow to the Herreras' lawsuit against AHMSI. As to the fourth issue, it was not actually and necessarily litigated in the unlawful detainer action. That issue, however, is immaterial and provides no basis for recovery.

In its summary judgment motion, U.S. Bank quoted *Cheney* and correctly argued that to prevail on its claim under section 1161a(b)(3), it must "prove a sale in compliance with the statute and deed of trust, followed by a purchase at such sale." (*Cheney*, *supra*, 9 Cal.2d at p. 160.) To establish these requirements, U.S. Bank submitted, among other materials, three important documents, all of which were certified by the Recorder-Clerk of El Dorado County and referenced by the trial court in its summary judgment order.

The first document is a certified copy of the first deed of trust, recorded April 17, 2006 (Exhibit B to the Starrett declaration). The deed of trust, signed by Donald Anderson and Debra Grimes, indicates it serves as security for a promissory note they executed. The deed of trust appoints Premier Trust

Deed Services, Inc. as the trustee and grants it the power of sale. The second document is a certified copy of a substitution of trustee, recorded September 8, 2008 (Exhibit E to the Starrett declaration). This document indicates that the original trustee on the deed of trust was Premier Trust Deed Services, Inc., and that AHMSI is being substituted in as the trustee. The third document is a certified copy of a trustee's deed upon sale, recorded September 4, 2009, indicating that U.S. Bank purchased the property for $280,500 at a trustee's sale held on August 27, 2009 (Exhibit A to the Starrett declaration). This deed of trust contains recitals of compliance with Civil Code section 2924. (See Civ. Code, § 2924, subd. (c).)[6] In addition to these documents, U.S. Bank submitted a Notice of Default and Election to Sell and a Notice of Trustee's Sale.

In light of the summary judgment briefing and documentary submissions, the trial court concluded that U.S. Bank established "each element" of its claim, that it "purchased" the property at a "duly noticed and validly conducted Trustee's

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[6] Civil Code section 2924, subdivision (c), states: "A recital in the deed[,] executed pursuant to the power of sale[,] of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice."

sale," that the sale was held in "compliance with [Civil Code section] 2924" and "perfection of title" had occurred.[7]

a. First issue

Turning back to the Herreras' lawsuit, the issue of whether "proper notices" were "published" or "posted" was actually and necessarily litigated in the unlawful detainer action. U.S. Bank contended and submitted evidence showing that the trustee's sale was held in compliance with Civil Code section 2924, a necessary element of its claim. The trial court concluded that the sale was "duly noticed" and complied with Civil Code section 2924. As in *Malkoskie*, the Herreras are now collaterally estopped from contending to the contrary.

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[7] We are in no position to second-guess and we express no opinion on whether U.S. Bank proffered competent and sufficient evidence to establish each element of its claim and obtain summary judgment. The Herreras did not object to that evidence. Even if the objection were not deemed waived by their failure to object (§ 437c, subd. (b)(5)), the time to appeal the unlawful detainer judgment has passed. The Herreras do not dispute that the judgment is now final. Accordingly, the question of whether U.S. Bank made the requisite showing to obtain summary judgment is not before us and is immaterial for issue preclusion purposes. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 975 [An "erroneous judgment is as conclusive as a correct one"]; *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 407 [quoting the same language and further noting "collateral estoppel may apply even where the issue was wrongly decided in the first action"].) Given this procedural posture, our recent decision in *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, has no application to the unlawful detainer action.

b. Second issue

The issue of whether U.S. Bank has a "provable interest" in the property and "paid consideration" was also actually and necessarily litigated in the unlawful detainer action. U.S. Bank argued and put on evidence showing that a sale was held in compliance with the statute and deed of trust, "followed by [a] purchase at such sale." (*Cheney*, *supra*, 9 Cal.2d at p. 160.) The trustee's deed upon sale showed that U.S. Bank purchased the property for a substantial sum. The trial court concluded U.S. Bank "purchased" the property and perfected title. Accordingly, as in *Malkoskie*, the issue of title was resolved. Any contention that U.S. Bank has no "provable interest" in the property or that it failed to pay consideration is now foreclosed.

c. Third issue

The issue of whether the trustee, AHMSI, had authority or standing to conduct the trustee's sale was also actually and necessarily litigated in the unlawful detainer action.

In the unlawful detainer action here, U.S. Bank contended and submitted evidence showing the trustee's sale was conducted "in compliance with the . . . deed of trust" (*Cheney*, *supra*, 9 Cal.2d at p. 160), a necessary element of its claim. The deed of trust submitted in connection with the motion conferred the authority to sell upon the trustee, and the substitution of trustee indicated that AHMSI was installed as trustee. The trial court noted both of these documents in its summary judgment order and determined that the judicial foreclosure sale

was "validly conducted" and "perfection of title" had occurred.[8] Thus, to the extent the Herreras assert that AHMSI failed to acquire authority to sell the property, or that AHMSI lacks sufficient evidence to demonstrate its authority to sell the property, such assertions are now precluded.

d. Fourth issue

The fourth and final issue is that the underlying promissory note "no longer exists," and no party possesses the "original" promissory note or deed of trust.

The physical existence vel non of the promissory note was not actually litigated in the unlawful detainer action. Collateral estoppel is thus inapplicable. The Herreras, however, face a larger problem.

A valid, title-transferring nonjudicial foreclosure can occur without possession or production of the promissory note. Under Civil Code section 2924, the "trustee" on the deed of trust or any of its authorized agents may initiate nonjudicial foreclosure. (Civ. Code, § 2924, subd. (a)(1); see also *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.) Nothing in Civil Code section 2924 establishes possession or production of the promissory note as a prerequisite to nonjudicial foreclosure.

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[8] "'Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt[,] [citation], which includes good record title [citation] . . . .' [Citation.]" (*Stephens, Partain & Cunningham v. Hollis* (1987) 196 Cal.App.3d 948, 953.) And the "term 'duly' implies that all of those elements necessary to a valid sale exist." (*Kessler v. Bridge* (1958) 161 Cal.App.2d Supp. 837, 841.)

"The comprehensive statutory framework established to govern nonjudicial foreclosure sales is intended to be exhaustive" (*Moeller*, *supra*, 25 Cal.App.4th at p. 834) and reflects "a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees" (*I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 288). "'Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute. [Citations.]" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154 [borrower may not bring an action to determine whether the owner of a note has authorized nonjudicial foreclosure].) Numerous courts have concluded that possession or production of the promissory note is not a requirement for nonjudicial foreclosure under California law. (See, e.g., *Saldate v. Wilshire Credit Corp.* (E.D.Cal. 2010) 686 F.Supp.2d 1051, 1068; *Jensen v. Quality Loan Service Corp.* (E.D.Cal. 2010) 702 F.Supp.2d 1183, 1189); *Ngoc Nguyen v. Wells Fargo Bank, N.A.* (N.D.Cal. 2010) 749 F.Supp.2d 1022, 1035; *Hafiz v. Greenpoint Mortg. Funding, Inc.* (N.D.Cal. 2009) 652 F.Supp.2d 1039, 1043 (*Hafiz*); *Pantoja v. Countrywide Home Loans*, Inc. (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1186.) We agree.

The Herreras suggest that the original promissory note is missing because it was bundled together with other loans and turned into an investment vehicle. Whatever reason explains the alleged missing status of the original promissory note, it does not change the fact that possession or production of the note is

not required for nonjudicial foreclosure. Moreover, courts have rejected the notion that a trustee's sale pursuant to a deed of trust is called into question because the underlying promissory note was pooled with other notes and securitized. (*Lane v. Vitek Real Estate Industries Group* (E.D.Cal. 2010) 713 F.Supp.2d 1092, 1099 [rejecting the argument that "none of the defendants ha[d] the authority to foreclosure because the[] loan was packaged and resold in the secondary market, where it was put into a trust pool and securitized"); *Hafiz*, *supra*, 652 F.Supp.2d at p. 1043 [rejecting the argument that the "defendants lost their power of sale pursuant to the deed of trust when the original promissory note was assigned to a trust pool"].)

To the extent the Herreras also allege that no party possesses the original deed of trust or that it no longer exists, issue preclusion is inapplicable. In the unlawful detainer action, U.S. Bank produced a certified copy of the deed of trust, not the original wet-ink copy.

Nevertheless, as with the contention that possession or production of the promissory note is required, the Herreras have not pointed to any controlling authority interpreting the statutory scheme to require possession or production of the original deed of trust. It is not our prerogative to tinker with or add requirements to the detailed statutory framework for nonjudicial foreclosure. The Legislature certainly knows how to add "original" documentation requirements to statutory schemes. (See, e.g., Fish & G. Code, § 8043.2, subd. (a)(2).) And the Legislature did not require the production of the original

promissory note or the original deed of trust as part of the exhaustive statutory framework. We decline to add such requirements through judicial fiat to recalibrate the carefully crafted balance the Legislature achieved. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827 ["courts may not add provisions to a statute"].)

Given that possession or production of the promissory note and original deed of trust are not statutory requirements for a valid nonjudicial foreclosure, the Herreras' attempt to set aside the foreclosure, cancel U.S. Bank's deed, and quiet title because no party possesses the promissory note or because it no longer exists[9] lacks merit. The same holds true regarding production of the original deed of trust. The alleged absence of these documents provides no basis for relief.

e. The Herreras' other contentions

In sum, issue preclusion bars the Herreras from attacking U.S. Bank's title on the grounds that the trustee's sale lacked the proper notices, U.S. Bank has no provable interest in the property and paid no consideration, and the trustee lacked

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[9] To be clear, we are not presented with a claim that no promissory note *ever* existed. In such a case, any deed of trust that purported to act as security for the nonexistent promissory note would be a sham document, and any foreclosure based on that deed of trust would be a complete fiction. (Cf. *Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 714 ["No statute creates a presumption--conclusive or otherwise--for any purchaser--bona fide or otherwise--that any recitals in a trustee's deed render effective a sale that had no contractual basis"].) The Herreras' complaint assumes that a promissory note initially existed, but allegedly it "no longer exists" and no party possesses the "original."

authority to sell. These matters were actually and necessarily litigated in the unlawful detainer action and decided adversely to the Herreras. Therefore, issue preclusion applies and eviscerates the first three causes of action. After issue preclusion is applied, what remains of the first three causes of action fails to advance any viable claim.

The Herreras raise several arguments to avoid issue preclusion and salvage their attack on U.S. Bank's title. None are persuasive.

The Herreras apparently seek to distinguish *Malkoskie*, emphasizing that the judgment there was the result of stipulation. This is a distinction without significance. As the court in *Malkoskie* noted, "under California law, a 'judgment entered without contest, by consent or stipulation, is usually *as conclusive a merger or bar as a judgment rendered after trial*.'" (*Malkoskie*, *supra*, 188 Cal.App.4th at p. 973, italics added.) Thus, the preclusive effect of another case does not turn on whether the judgment in that case is the result of stipulation or judgment rendered after trial or, as in the Herreras' unlawful detainer case, the result of summary judgment.

The Herreras further contend that issue preclusion cannot be asserted because the unlawful detainer court lacked "jurisdiction" to determine title. The Herreras argue: "In this case, [the Herreras] put title in issue in [the] unlimited jurisdiction trial court PRIOR to the filing of the unlawful detainer action being filed *in the limited jurisdiction court*.

The unlawful detainer complaint was filed September 29, 2009. The *limited jurisdiction court* was specifically informed that it had NO jurisdiction over the ownership/title to the real property because [the Herreras] filed their Notice of Related and Identical Cases; Prejudgment Right to Possession and Answer on October 27, 2009--which attached the *unlimited jurisdiction court's* complaint!" (Italics added.) We reject this argument.[10]

The Herreras' "no jurisdiction" argument reflects an apparent misunderstanding of California trial courts. There are no "limited jurisdiction" trial courts in California. "In 1998 the California Constitution was amended to permit unification of the municipal and superior courts in each county into a single superior court system having original jurisdiction over all matters formerly designated as superior court and municipal court actions. [Citation.] After unification, the municipal courts ceased to exist. [Citation.] Now civil cases formerly within the jurisdiction of the municipal courts are classified as 'limited' civil cases, while matters formerly within the jurisdiction of the superior court[]s are classified as 'unlimited' civil action[s]." (*Ytuarte v. Superior Court* (2005) 129 Cal.App.4th 266, 274.) The courts of all counties,

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[10] Although the Herreras have repeatedly asserted that the unlawful detainer court had "no jurisdiction" to determine title, the Herreras have never cited any authority to support their position. Because their conclusory argument is unsupported by citation to authority, we could treat it as forfeited. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) We will nevertheless address this argument.

including El Dorado, have been unified. (*General Electric Capital Auto Financial Services, Inc. v. Appellate Division* (2001) 88 Cal.App.4th 136, 141, fn. 1.)[11] Postunification, the superior court "'has original jurisdiction of limited civil cases, but these cases are governed by economic litigation procedures, local appeal, filing fees, and . . . other procedural distinctions that characterize these cases in a municipal court.' [Citations.]" (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 763, fn. 2, 2d par.) Therefore, it is imprecise to refer to the unlawful detainer court here as one of "limited jurisdiction" because original jurisdiction over the unlawful detainer matter vested in the Superior Court of El Dorado County.

Courts recognize a distinction between an act in excess of a court's ordinary jurisdiction, which creates a judgment or order that is voidable upon a timely and direct challenge, and an act in excess of a court's "fundamental jurisdiction," which creates a void judgment or order subject to direct or collateral attack. The distinction was discussed by our high court in *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653. "Essentially, jurisdictional errors are of two types. 'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case,

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[11] The Superior Court of El Dorado County unified on August 1, 1998. (See http://www.courts.ca.gov/documents/unidate.pdf [as of Jan. 29, 2012].)

an absence of authority over the subject matter or the parties.' [Citation.] When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.' [Citation.] [¶] However, 'in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations.' [Citation.] It may also 'be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' [Citation.] '"[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction."' [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by 'principles of estoppel, disfavor of collateral attack or res judicata.'" (*American Contractors, supra,* 33 Cal.4th at pp. 660-661.)

This distinction was further discussed in *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1101-1105 (*McGrath*). There, a water agency sued the defendant in superior court to recover charges owed. The defendant answered, asserting that the enactment under which the agency assessed the charges was unconstitutional. The agency moved for

summary judgment and summary adjudication, contending that the constitutional challenge was barred by a prior judgment in which the issue of the validity of the charges had been determined adversely to the defendant. The defendant replied that because the prior action was commenced in municipal court, which lacked jurisdiction over any action involving the legality of a tax or similar charge, the judgment was beyond the rendering court's power and void and collateral estoppel principles did not apply. However, the prior case was tried after the municipal court merged with the superior court. (*McGrath*, *supra*, at p. 1097.)

On appeal, the court affirmed the trial court's grant of summary adjudication on the constitutional validity of the charge. (*McGrath*, *supra*, 128 Cal.App.4th at pp. 1101-1102.) The Court of Appeal reasoned that after unification, the court in which the action was originally filed did not lack fundamental jurisdiction. (*McGrath*, *supra*, 128 Cal.App.4th at pp. 1097, 1102.) That is because on the day the courts unified, the prior action automatically became a limited civil case pending before the superior court. "[T]he case was no longer pending before the municipal court, a court of limited jurisdiction, but before the superior court, a court of general jurisdiction, and indeed the only court in which it could now be tried." (*McGrath*, *supra*, at p. 1102.) "The court therefore did

not lack the fundamental power to adjudicate the matter." (*Ibid.*)[12]

In our view, the court that heard the Herreras' unlawful detainer case had both fundamental and ordinary jurisdiction over issues presented in the Herreras' action here. As we have noted, that court was not a "limited jurisdiction court," but rather a department of the superior court, a court of general jurisdiction. Thus, the court had fundamental jurisdiction to decide any matters within the jurisdiction of the superior court. And that court was required to determine issues related to title in the unlawful detainer proceeding under section 1161a. Thus, the court also had ordinary jurisdiction to determine those issues -- issues that are coincident with those raised in the Herreras' action against AHMSI. Because the court had both fundamental and ordinary jurisdiction, issue preclusion principles apply to the issues decided by that court.

Even assuming, arguendo, that the court acted beyond its ordinary jurisdiction, it still had fundamental jurisdiction as

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[12] We acknowledge that the court in *McGrath* noted the fact that the case could have been reclassified as an unlimited jurisdiction case based on the defendant's constitutional defense. (§§ 86, subd. (a), 403.010 et seq.) In our view, the appellate court's holding that the trial court had fundamental jurisdiction did not turn on that circumstance. As the court noted, "when McGrath's answer tendered issues concerning the validity of the charges, it had the effect of potentially changing the matter from a limited case to an unlimited case. That change, however, would not affect the fundamental jurisdiction of the court; it would only relieve the parties of certain limitations affecting the *manner* in which the case could be adjudicated." (*McGrath*, *supra*, 128 Cal.App.4th at p. 1103.)

a department of the superior court. Thus, the judgment would only be voidable and because that judgment is final, the Herreras are now collaterally estopped from raising issues decided in that action.

The Herreras point out that their case was filed prior to the unlawful detainer case and argue that they put title in issue in the "unlimited jurisdiction trial court" first. The mere sequence in which the two cases were filed has no bearing on issue preclusion. "Where two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but the first final judgment, although it may be rendered in the second suit, that renders the issue *res judicata* in the other court." (*Domestic & Foreign Pet. Co., Ltd. v. Long* (1935) 4 Cal.2d 547, 562; accord, *Torrey Pines Bank v. Superior Cour*t (1989) 216 Cal.App.3d 813, 823-824.) The judgment reached in the unlawful detainer action is now the first final judgment.

The Herreras also argue that AHMSI lacked "standing" to foreclose under article III of the United States Constitution, and that this lack of "standing" may be raised at any time, including in their appeal. This argument lacks merit; it misapprehends the nature and scope of article III standing.

Article III standing is a federal jurisdictional requirement for obtaining relief in federal courts. (*Arizona Christian School Tuition Organization v. Winn* (2011) ___ U.S. ___, ___ [179 L.Ed.2d 523, 531-532, 131 S.Ct. 1436, 1440] ["To obtain a determination on the merits in federal court, parties

seeking relief must show that they have standing under Article III of the Constitution"]; *Whitmore v. Arkansas* (1990) 495 U.S. 149, 154-155 [109 L.Ed.2d 135] ["Article III, of course, gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process"].) Article III standing is not a requirement for state court litigants. (*ASARCO, Inc. v. Kadish* (1989) 490 U.S. 605, 617 [104 L.Ed.2d 696] ["We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy"]; *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117 ["article III of the federal Constitution does not apply in state courts"].) Accordingly, article III standing has no bearing here.

Absent any persuasive argument against its application, we apply issue preclusion on appeal. The Herreras have not explained how they could amend the first three causes of action to avoid the sweep of issue preclusion and state viable claims. Accordingly, the trial court did not err in sustaining the demurrer to the first three causes of action without leave to amend.

II. AHMSI'S Challenge to the Fourth Cause of Action

"It is elementary that a stranger to a proceeding has no standing to interpose a motion." (*Beshara v. Goldberg* (1963) 221 Cal.App.2d 392, 395.) AHMSI demurred to the fourth cause of action for unjust enrichment, but as the Herreras point out in

their appellate briefing, that cause of action was alleged only against U.S. Bank.[13]

Because AHMSI is a stranger to the unjust enrichment cause of action, AHMSI lacked standing to challenge this cause of action and obtain its dismissal. (See *U.S. Western Falun Dafa Assn. v. Chinese Chamber of Commerce* (2008) 163 Cal.App.4th 590, 594, fn. 3 [noting that the trial court denied the defendant's motion to strike as to causes of action that were not asserted against the defendant because the defendant lacked standing to bring the motion]; see § 581, subd. (f)(1) & (2) [when a defendant's demurrer is granted without leave to amend or with leave to amend and no amendment is proffered by the plaintiff, the trial court may "dismiss the complaint *as to that defendant*"], italics added.)

Whether to demur to the unjust enrichment cause of action is ultimately a decision for U.S. Bank and its counsel if U.S. Bank is served. We cannot say that permitting AHMSI to demur to and obtain dismissal of a cause of action alleged against another party was harmless error. Absent the error, the cause of action would have remained unchallenged in the trial court and hence a continuing part of the litigation against U.S. Bank.

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[13] In opposition to the demurrer, the Herreras questioned whether AHMSI's motion really attacked more than the action against AHMSI. It did, and on appeal, AHMSI still pursues dismissal of the unjust enrichment cause of action, which is alleged against U.S. Bank.

We reverse the trial court's ruling sustaining the demurrer to the fourth cause of action.

III. The Indispensable Party Argument

AHMSI demurred to the operative complaint (including the fourth cause of action) on the ground that the Herreras failed to join an indispensable party; namely, U.S. Bank. The trial court's tentative decision, which eventually became its final order, is silent on this argument. Nevertheless, AHMSI contends on appeal that the Herreras' failure to join an indispensable party supplies an independent basis for affirmance. Given our conclusion that the trial court properly dismissed the first three causes of action against AHMSI, there are no remaining causes of action left against AHMSI to dismiss on indispensable party grounds. Whether the causes of action against AHMSI should be dismissed for failure to join an indispensable party is moot.

IV. Professionalism

On a final note, we feel compelled to address a few matters of "ethics, civility, and professionalism" (*People v. Chong* (1999) 76 Cal.App.4th 232, 243 (*Chong*)) that have arisen on both sides of the table during this litigation.

As for AHMSI, its counsel argued in a footnote, appearing on the first page of its appellate brief, that the "facts of this matter closely mirror another matter brought by Appellants, i.e., *Herrera v. Deutsch* [*sic*] *Bank National Trust Company*, Superior Court Case No. SC20090170. In that matter, like this matter, the Appellants purchased a piece of real property

subject to an existing deed of trust and argued that the existing deed of trust should be disregarded for a variety of reasons. The Trial Court ruled in favor of the lender on the existing deed of trust, and Appellants appealed the judgment entered against them. The Third Appellate District Court recently issued a decision in that matter, *Herrera v. Deutsch* [*sic*] *Bank National Trust Company*, 2010 WL 5275172 (Cal.App.3d Dist.) The Third Appellate District Court ruled unequivocally against Appellants on all of their claims and attempts to set aside the existing deed of trust."

Counsel again made reference to the Herreras' other appeal in responding to the Herreras' unjust enrichment argument in this appeal. "As this Court pointed out in *Herrera v. Deutsch* [*sic*] *Bank National Trust Company*, 2010 WL 5275172 (Cal.App.3d Dist.), there is no 'unjust enrichment' here, since the mortgage holder, like Deutsche Bank in that matter, had a security interest in the Subject Property which, upon default of the Subject Loan, had a right to protect."

"Counsel should never misrepresent the holding of an appellate decision. Not only would that be a violation of counsel's duty to the court (Bus. & Prof. Code, § 6068, subd. (d)), it will backfire because the court will discover the misrepresentation, particularly when it relates to a decision issued by that court." (*In re S.C.* (2006) 138 Cal.App.4th 396, 417 (*S.C.*).) Counsel's offense here is more serious. The document counsel cited, "2010 WL 5275172," is not a decision from this court; rather, it is the appellate brief of respondent

Deutsche Bank National Trust Company in the Herreras' other appeal. Even a cursory review of the document reveals what it is. Among other indicators, "Respondent['s] Brief" in bold font is centered at the top. The fact of the matter is that the appeal in the Herreras' other case was still pending at the time briefing in this appeal was concluded. And as it turns out, we later issued a decision in which the Herreras largely prevailed. (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366.)[14]

We remind counsel of the duty to not mislead the judiciary by making affirmative representations that have no foundation in law or fact. (See Bus. & Prof. Code, § 6068, subd. (d) [duty of attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"]; Rules Prof. Conduct, rule 5-200(C) [a member of the State Bar "[s]hall not intentionally misquote to a tribunal the language of a book, statute, or decision"].) These express obligations carry with them the implied obligation to correct erroneous representations when the inaccuracy is called to counsel's attention. Indeed, it has long since been the obligation of attorneys to admit their errors to the court. (*Grand Grove etc. v. Garibaldi Grove* (1900) 130 Cal. 116, 122-123.) Assuming counsel's citation to respondent's brief in the Herreras' other

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[14] However, in the unpublished portion of the opinion, we rejected the Herreras' unjust enrichment argument and directed the trial court to enter an order granting summary judgment of that cause of action.

appeal was a mistake,[15] the Herreras' reply brief here should have alerted counsel to the need to immediately admit the error and offer an apology to this court and opposing counsel. Indeed, it would have been appropriate for counsel to immediately move to strike references to the respondent's brief in *Herrera v. Deutsche Bank National Trust Co.*, as well as the associated arguments he made based on the erroneous notion that the brief was an opinion of this court.[16]

Turning to Herreras' counsel, he has saturated his appellate briefing with unnecessary and inflammatory rhetoric. A few examples will demonstrate the point.

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[15] It is hard to understand why an attorney would have done this intentionally. On the other hand, it is equally hard to understand how a diligent attorney could have made this mistake. In this age of technology, electronic legal research databases make available many sources of information. It should go without saying that counsel should be careful to confirm that documents revealed by electronic research are actually citable authorities.

[16] On February 24, 2012, this court received a letter from counsel for AHMSI dated February 21, 2012, in which counsel addresses this matter for the first time. Even now, it is apparent from the letter that counsel still does not realize that what he cited was not an appellate decision, but rather a party's brief. Counsel wrote: "Please take notice that counsel for Defendant and Respondent, AHMSI Default Services, Inc. cited *Herrera v. Deutsch Bank National Trust Company*[,] 2010 WL 575172 (Cal.App.3 Dist.) (Superior Court Case No. SC20090170), erroneously in footnote one of Respondent's Brief, for the proposition that the Court of Appeal in that matter ruled in favor or [*sic*] Respondent, when in fact, in that matter, the Court of Appeal ruled in favor of Appellant in part, it is [sic] ruling on the summary judgment in the underlying matter. That matter is now cited as *Herrera v. Deutsch Bank National Trust Company* (2011) 196 Cal.App.4th 1366."

On appeal, Herreras' counsel argues in his opening brief that the trial court "was so used to getting rid of Foreclosure Industry cases without having to tie itself up with actual PROOF or Trials, that it just dumped this case for NO legally acceptable reason!" Turning to the concept of judicial notice, counsel contends, "[i]n order . . . to avoid the Evidence Code's problem with hearsay exclusions, document authentications and inability to actually provide proof of their standing to foreclose, clever members of the Bar came up with 'Judicial Notice' to self-excuse themselves from having to provide admissible evidence, which is way too much trouble when you have to throw, literally, MILLIONS of people out on the streets." Finally, according to counsel, "AHMSI will argue that well, the above are just another set of those annoying technical laws that California's Legislature did not really mean to be enforced -- literally. 'Come on . . . we all know that the Foreclosure Industry' is immune from having to prove anything . . . and WE deserve to be so immune, or it would take so much longer to throw people out of their homes than it does now!'"

Counsel's hyperbole is not limited to his appellate briefing. In the trial court, he engaged in similar conduct. For example, in his opposition to the demurrer, he referred to AHMSI as "a Foreclosure Industry le[e]ch."

This hyperbole does absolutely nothing to advance the legal position of counsel's clients. (*In re Ross* (2009) 170 Cal.App.4th 1490, 1513-1514 [noting the unhelpful nature of hyperbole in briefing]; see also *Troung v. Orange County*

Sheriff's Dept. (2005) 129 Cal.App.4th 1423, 1429-1430.) Not only is counsel's hyperbole unpersuasive, but it is distracting and it has the potential of detracting from the credibility of his legal arguments. Moreover, we remind counsel that "it is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law. . . ." (*Chong*, *supra*, 76 Cal.App.4th at p. 243.) An attorney "must maintain a respectful attitude toward the court" (*ibid.*) and "unwarranted personal attacks on the character or motives of the opposing party, counsel, or witnesses are inappropriate and may constitute misconduct" (*S.C.*, *supra*, 138 Cal.App.4th at p. 412).[17] Counsel would do well to consult the California Attorney Guidelines of Civility and Professionalism promulgated by the State Bar in 2007.[18]

We hope and trust that in future proceedings counsel for both parties will heed the call of their professional obligations and steer clear of the conduct discussed herein. Other courts or tribunals may not be so forgiving.

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[17] Counsel is cautioned that with respect to his trial court filings, he is subject to the strictures of section 128.7, and the trial court has authority to issue sanctions under this section sua sponte. (See § 128.7, subd. (c)(2).)

[18] This publication can be found at: http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=mPBEL3nGaFs%3D&tabid=455 (as of May 14, 2012).

DISPOSITION

The trial court's judgment dismissing the first, second, and third cause of action against AHMSI is affirmed. We reverse the trial court's judgment as to the fourth cause of action and remand for further proceedings not inconsistent with this opinion. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

MURRAY, J.

We concur:

RAYE, P. J.

BLEASE, J.